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IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, ET AL.,

Respondents.

On Writ of Certiorari to the Colorado Supreme Court

Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

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Interests of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrest of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking out other channels to express their opposition to abortion. Unfortunately, the response of municipalities in California was not to applaud this conversion to lawful means of protest, but to seek out ways to make the protests unlawful. For example, many California cities passed residential picketing ordinances, including ordinances which prohibited picketing within 300 feet of a "targeted" residence. *See Thompson v. City of San Jose*, 32 Cal.App.4th 330 (1995) cert. denied, 516 U.S. 932. Some cities passed "back-off" buffer zone laws, such as those struck down by the Ninth Circuit in *Sabelko v. Phoenix*, 120 F.3d 161 (9th Cir. 1997). At least one city enacted an ordinance creating eight-foot "demonstration-free" zones around the driveway entrances to health care facilities. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (1998), cert. denied, 119 S.Ct. 1142 (1999). Another city attempted to limit the size of picket signs and

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[1] Counsel of Record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

force picketers to keep moving. *Foti v. Menlo Park*, 146 F.3d 629 (9th Cir. 1998).

LLDF and those associated with it are very concerned about the proliferation of laws designed specifically to restrict anti-abortion speech.[2] Whether or not these ordinances survive facial challenges to their content-neutrality, they risk undermining the integrity of police and prosecutors charged with enforcing laws such as these, laws which are generally known and understood to be directed at particular speakers and viewpoints. LLDF submits that this Court should give careful scrutiny to restrictions on speech which are aimed directly at expressive activities surrounding particular social and political controversies.

I. Introduction and Summary of Argument

In 1993, the Colorado General Assembly enacted § 18-9-122, indisputably in response to reports of "harassment" and obstruction of individuals seeking access to medical facilities where abortions are provided. *See* Joint Appendix, 58a-216a. Unfortunately, the Assembly apparently was so focused on this particular context, and possibly even on particular locations, that it failed to consider the application of the statute to other contexts, as well as whether the language it used would be clear to those who wished to engage in peaceful expressive activity.

Although the Legislature was only thinking "inside the

[2] E.g., "There is no doubt that the City passed these ordinances in response to Foti and Larsen's [anti-abortion picketing] activities or that the City specifically sought to restrict their protests." *Foti v. Menlo Park*, *supra*, 146 F.3d at 633 n. 1.

box" of certain forms of anti-abortion protest, § 18-9-122 applies to a wide range of speech activity on public streets and sidewalks in the vicinity of *any* "health care facility" in the state. Thus, it was left to reviewing courts to place limiting constructions on the statute's broad terms in an effort to bring the application of the statute back within the confines of "the box" of anti-abortion protests. For example, the Colorado Court of Appeal stated, "As pertinent here, 'protest' refers to written or oral communication advocating a particular viewpoint *on medical treatment and procedures*." Pet. at 44a (emphasis added). Obviously, there is nothing on the face of the statute that indicates that the term "protest" applies only to certain topics. The Court of Appeals also explained, " 'Counseling and education' refer to efforts to present information or guidance to persons *entering or leaving a health care facility*." *Id.* (emphasis added). Again, nothing in the plain language of the statute indicates that, in the case of oral counseling and education, the "no-approach" strictures apply only when the approached person is entering or leaving a facility.

This Court observed a century and a quarter ago, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876). Yet this is exactly the role that the lower courts here have agreed to play, namely, putting pinches and tucks in the legislature's net, allowing some to be detained while others go free, without any discernible relationship to a legitimate governmental interest.

A statute or ordinance which forbids an act "in terms so vague that men of common intelligence must necessarily guess

at its meaning and differ as to its application violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, laws which regulate or restrict speech must satisfy "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside, Hoffman Estates* 455 U.S. 489, 499 (1982) (footnote omitted).

> Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine, the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (internal quotations and citations omitted.)

It is undisputed that C.R.S. 18-9-122 restricts constitutionally protected speech activity in the "quintessential" public forum of public streets and sidewalks. Because of the vagueness of its terms, the ordinance is arguably "violated scores of times daily, . . . yet only some individuals, those chosen by the police in their unguided discretion, are arrested." *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987).

Petitioners challenged the statute on a number of grounds

including the void-for-vagueness doctrine. Pet. 4a, 44a. The Colorado Supreme Court breezily pronounced that the statute's terminology was "simple and straightforward." Pet. at 24a. In the petition for certiorari, petitioners have relied principally on other constitutional challenges and have not highlighted their earlier void-for-vagueness challenge, although the issue has been preserved in the first question presented in the petition. Rather, Petitioners contend the statute is content-based or impermissibly delegates content-based censorship powers to the audience. Should those facial challenges prove unavailing, amicus submits that this Court should carefully consider the void-for-vagueness challenge which Petitioners preserved throughout the Colorado appellate process and that this Court should hold the statute to be void for vagueness.

II. Section 18-9-122 is Unconstitutionally Vague

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates v. Flipside*, *supra*, 455 U.S. at 494 (1982). "For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973), quoting *Minnesota ex. rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940).

Section 18-9-122, in pertinent part, makes it a misdemeanor to "knowingly approach another person within eight feet of such person, unless such person consents, for the purpose of passing a handbill or leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with

such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility."

Section 18-9-122 is vague in at least four respects.

A. *"approach"*

The Supreme Court of Colorado stated that § 18-9-122(3) sets out the prohibited conduct "in rather simple but straightforward language." Pet. at 24a. However, other than simply repeating the term "knowingly approach," the court did not attempt to further describe the prohibited conduct. What the court did describe was conduct that would *not* violate the statute. The court stated that, "If one of the petitioners is *standing still* within the fixed buffer zone," then that person could not violate the ordinance. *Id.* (emphasis added). In the next sentence, the court states, "In other words, so long as the petitioner *remains still*, he or she cannot commit the actus reus of approaching, . . ." *Id* (emphasis added). These formulations indicate that any bodily movement by a speaker, e.g., holding out a leaflet at arm's length, gesturing to a person to come closer, repositioning or holding out a sign for better visibility, could constitute "approaching."

Webster's Third New International Dictionary defines "approach" as "to draw near to." Does § 18-2-122(3) prohibit only that motion which brings the speaker's entire body closer to the approached individual? Or does it also prohibit any bodily movement by the speaker directed at an individual who is within eight feet?

The Supreme Court of Colorado did not concern itself with the dynamic situation likely to be encountered on a busy sidewalk. Suppose, for example, that a protester is twenty feet from another person and, in compliance with the statute,

walked ten feet toward that person. Suppose further that, as the protester moved ten feet, the other person advanced five feet toward the protester. Has the protester committed a prohibited "approach"? One can formulate an argument that the protester has not violated the statute but, without any certain rule akin to basketball's offensive foul for charging, the argument provides little comfort. In the hurly-burly of a crowded sidewalk, any movement by a protester could be interpreted as a prohibited "approach."

Rather than being a "simple and straightforward" prohibition, the vagueness of the statute gives rise to many questions and no certain answers. Even if refined rules were adopted, fair application of the rules in a dynamic real life scenario would require a combination of referees, umpires and instant replay. The Assembly, having failed to set forth the rules of the game, has left it to policemen and prosecutors to formulate their own rules of engagement. This is intolerable especially where the regulated activity is speech in a public forum on matters of controversy.

B. *"unless such person consents"*

The Colorado Court of Appeals defined the term "consent" as "oral communication or unmistakable physical conduct manifesting agreement." Pet. at 44a. What does "manifesting agreement" mean? Is the speaker limited to approaching within eight feet of another if and only if the intended audience has unmistakably signaled that he agrees with the speaker's position? In other words, is the speaker limited to preaching to the choir, i.e., a person who already agrees with his viewpoint on the taboo subject of medical treatment and procedures? Or does "agreement" mean only "agreement" that one can come within eight feet of

the other to leaflet, display a sign, or counsel and educate?

Even presuming that "agreement" means agreement to be approached, it is difficult to apply that definition in the noisy, fluid environment of a city street or sidewalk. In contrast to the image of raucous crowds of demonstrators jostling abortion-bound women invoked by the General Assembly in enacting § 18-9-122, the courts reviewing the ordinance seemed to assume a sidewalk occupied by only two people, the patient and the speaker. In such a setting, the presumption runs, the speaker could ask permission to approach and the other person could consent or refuse, all with minuet-like precision and clarity.

In reality, it is highly likely that there will be other people on the sidewalk, including some who will interfere with the communication of request and consent. As the legislative history of § 18-9-122 indicates, abortion providers frequently employ "escorts" to patrol the public sidewalk and insert themselves between demonstrators and patients. Obviously, it would be very difficult for a speaker effectively to ask consent to approach and a patient effectively to communicate a response, with one or more escorts standing between, walking the patient down the sidewalk.[3]

Patient companions, e.g., boyfriends, husbands, parents also often take it upon themselves to inhibit or prevent communication between speakers and potential patients, includ-

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[3] It should be noted that nothing in § 18-9-122 prohibits an escort from approaching an individual and saying, "I think these people are idiots or dangerous or both. I'll walk with you into the clinic." The escort can continue making such enlightening comments (which are neither protest of a medical procedure nor education nor counseling) all the while the would-be speaker is attempting to request permission to approach.

ing the communication necessary to solicit and obtain consent.

For the speaker who simply wants to hand out leaflets to passers-by, the requirement of obtaining consent is extremely onerous. In *U.S. v. Kokinda*, 497 U.S. 720, 734 (1990) (O'Connor, J.) and *ISKCON v. Lee*, 505 U.S. 672, 690 (1992) (O'Connor. J.), a majority of this Court noted the distinction between leafleting and solicitation in terms of the impact on the flow of pedestrian traffic: "[C]onfrontation by a person asking for money disrupts passage and is more intrusive than an encounter with a person giving out information. One need not ponder the contents of a leaflet in order mechanically to take it out of someone's hand. . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey' [citing *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 665 (1981) (Blackmun, J. conc. and diss.)]."

Under § 18-9-122, the ostensible purpose of which is to prevent interference with pedestrian and vehicular traffic, this "common sense" distinction is reversed. A person soliciting money may approach another without seeking consent. However, the speaker who wishes to offer a leaflet must first ask consent, and the intended recipient cannot "mechanically take it" but must affirmatively give consent. The process of the recipient pondering whether to give consent, pausing to communicate that consent, and waiting for the approach is more likely to disrupt sidewalk passage than is simple leafleting unencumbered by such requirements.

C. *"oral protest, education, or counseling"*

On its face, the challenged portion of the Colorado statute prohibits approaching within eight feet of another person for any of three purposes:

(a) passing a leaflet or handbill;
(b) displaying a sign; or
(c) engaging in oral protest, education or counseling. The three purposes are listed in the disjunctive and therefore presumably provide three independent bases for prosecution.

The Colorado courts have placed a limiting construction on only the third proscribed purpose. According to the Colorado Court of Appeal, "protest" does not encompass the entire universe of possible protests. Rather it is limited by the subject matter of the "protest", namely, to "written or oral communication advocating a viewpoint on medical treatment and procedures." Pet. at 44a.[4] But the limiting definition of "protest" does not seem to apply to the other prohibited purposes, i.e., wielding a sign or passing out leaflets. Thus the prohibition on "approaches" for the purpose of leafleting or displaying a sign is absolute. On the other hand, "approaching" to engage in "oral protest" appears to violate the statute only if the protest addresses a taboo subject,

[4] The Colorado Supreme Court initially seems to reject the Court of Appeal's narrowing construction of "protest" when it held that "[t]he restrictions apply squarely to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Pet. at 21a, 22a. But the state supreme court ultimately affirmed the Court of Appeal's decision, including presumably its narrowing construction, when it concluded: "section 18-9-122(3) represents a fair legislative balancing of the 'right to protest or counsel against certain medical procedures' while protecting 'a person's right to obtain medical counseling and treatment.'" *Id.* at 28a.

in this case, "a viewpoint on medical treatment or procedures."

The limiting construction the Colorado Court of Appeals places on "education or counseling" also complicates matters. The Court of Appeals not surprisingly defines education and counseling as "efforts to present information or guidance." Pet. at 44a. This definition is apparently not limited to the taboo subject of "medical treatment and procedures" but applies to the entire universe of possible subject matters. But the Court of Appeals goes on to limit the meaning of "counseling and education" by reference to a limited audience, namely, those "persons entering or leaving a health care facility." *Id.* Presumably, this leaves a citizen within 100 feet of a health care facility free to approach another without consent for the purpose of "counseling and education" provided that the other person is a mere passerby, i.e., is not entering or leaving the health care facility.

Perhaps because it seems the least confrontational form of speech and is presumed to be deserving of the most protection, one of the most popular activities outside of abortion facilities is public prayer. But whether prayer is prohibited by the Colorado statute is unclear. Might law enforcement consider prayer a form of "oral protest"? Can prayer conceivably be viewed as "counseling or education?" The terms are too vague to allow one to hazard an answer.

"A viewpoint on a medical treatment or procedure" is also subject to arbitrary interpretation by law enforcement and prosecutors. Is a person who advocates adoption in front of an abortion facility, expressing "a viewpoint on a medical treatment or procedure"? Is a person in front of a "health care facility" who offers economic assistance to poor pregnant women so that they may have the opportunity to give birth and raise a child, engaged in "protest"? Is a feminist

who has no objection to abortion procedures as such, but who protests against "sex-selection" abortions within 100 feet of a "health care facility", expressing a "viewpoint on a medical treatment or procedure"?

Indeed, the very notion of "protest" is relative. Protest is by definition an expression of dissent from, and objection to, the established order of things. In a democracy, protest is by the nature of things, a minority viewpoint. Hence to punish protest is to punish the minority viewpoint. It was to prevent just such oppression by majorities that the First Amendment was adopted.

The limiting construction placed on "protest" does not diminish the vagueness of the term; it simply focuses law enforcement on a smaller target, namely, those who would have the temerity to protest against "medical treatment or procedures" outside of "health care facilities." In light of the legislative history, these terms appear to be euphemisms for one particularly controversial medical procedure, namely, abortion. The legislative history strongly suggests that the legislature purposefully chose broad and expansive—indeed, very vague—language to ensure the appearance of facial content neutrality while affording "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Here the full discretion afforded to police to determine whether the suspect has engaged in oral protest, education or counseling "necessarily entrust[s] law making to the moment-to-moment judgment of the policeman on his beat." *Kolender*, *supra*, 461 U.S. at 1859-60 (internal quotation marks and citations omitted).

D. *"within a radius of one hundred feet from any entrance door to a health care facility"*

First, this provision contains no requirement that the approaching person knows that he or she is within one hundred feet of the entrance door to a health care facility.[5] Thus, before leafleting for any purpose on any public sidewalk, an individual must ascertain the nature of all of the surrounding businesses, vertically as well as horizontally, to determine whether the area is subject to the restrictions of § 18-9-122. The presence of a single chiropractic office or optometric outlet creates a no-approach zone applicable to all potential speakers.

Second, "health care facility" is defined as "any entity that is *licensed, certified, or otherwise authorized or permitted by law to administer medical treatment* in this state." Pet. at 65a. Thus, the wouldbe speaker is charged with knowing both what types of entities are licensed, certified, authorized or otherwise permitted to "administer medical treatment," as well as the actual status of any entity which could potentially create a no-approach zone. For example, is a dental office or a drug store a "health care facility"? A citizen who leaflets without first studying the

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[5] Cf., e.g., 18 U.S.C.A. § 922(q)(2)(A): "It shall be unlawful for any individual to knowingly possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual *knows, or has reasonable cause to believe*, is a school zone." 18 U.S.C.A. § 921(a)(25): "The term 'school zone' means . . . b) within a distance of 1000 feet from the grounds of a public, parochial or private school."

See also Cal. Pen. C. § 626.9(b) (West 1999): "Any person who possesses a firearm in a place that the person *knows, or reasonably should know*, is a school zone . . . shall be punished as specified in subdivision (f)."

state health code and/or business code does so at his own peril.

Third, "health care facility" is defined as "any *entity* that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state." By this definition, doctors, nurses, optometrists, dentists, etc. are themselves "health care facilities." Thus, an individual must ascertain what is the "entrance door" to one of these professionals.

At first glance, the easiest answer would be that the doors to a doctor's office are his entrance doors. However, in the case of multi-tenant office buildings, vagueness returns. Is the "entrance door" the door to the building or the door to a particular office within the building? How is the speaker to know the extent of the doctor's leasehold within the building, e.g., that, while the doctor's main office is on the fifth floor at the back, he also rents space for a lab on the first floor in the front?

Moreover, does a medical professional carry his "entrance doors" with him? Does the presence of a nurse on school premises create a no-approach zone within a hundred feet of any entrance door to the school? Does the presence of a company doctor create no-approach zones within one hundred feet of entrance doors to the company?

These examples illustrate not only the dangers arising from the lack of a scienter requirement as to the existence of a "no-approach" zone, but also the overbreadth of the statute. Section 18-9-122 creates literally thousands of zones in the state of Colorado where expressive activity is restricted.

Conclusion

In its discussion of this Court's decision in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), the Colorado Supreme Court noted that "it was the uncertainty of how to comply with the injunction about which the Supreme Court appeared most concerned." Pet. at 27a. Indeed, if uncertainty was the main source of this Court's concern, then § 18-9-122 provides plenty of grounds for concern as well. Far from being a "simple and straightforward" time, place, and manner restriction, the prohibitions of § 18-9-122 are vague as to time, place, *and* manner.

This Court should find § 18-9-122 unconstitutional on its face. Concern for certainty "has, at times, led [this Court] to invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Kolender*, *supra*, 461 U.S. at 359 n.8. This is just such a statute.

Respectfully submitted,

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